



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Deloitte Haskins & Sells

File: B-222747

Date: July 24, 1986

DIGEST

1. The General Accounting Office (GAO) properly denied an offeror the award of a particular contract for audit services on the ground of conflict of interest where the firm is being investigated by GAO on another matter because such an award could have created the appearance of GAO's lack of impartiality in conducting the investigation.
2. The requirement for administrative due process--notice of charges and an opportunity to be heard--is inapplicable where a firm's exclusion from a particular contract is based upon the appearance of a significant conflict of interest in the government-contractor relationship, and not upon a determination that the firm lacks integrity in its business dealings.

DECISION

Deloitte Haskins & Sells (DH&S) protests a decision by the General Accounting Office (GAO) to deny the firm the award of a contract for audit services under request for proposals (RFP) No. OAM-85-N-0033 because of GAO's on-going investigation of DH&S activities at another federal agency. DH&S essentially contends that the denial of the contract constituted an improper de facto debarment without regard for the firm's due process rights. We¹/ deny the protest.

¹/ "We" or "this Office" refers to the Office of the General Counsel, General Accounting Office (GAO). GAO's "Procurement Guidelines" (GAO Order No. 0625.1, Aug. 4, 1981) provide that any protest with respect to a GAO procurement generally shall be processed as any other protest and shall be assigned to an attorney in the Office of the General Counsel having no previous connection with the procurement against which the protest has been filed.

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Background

The RFP was issued on July 12, 1985, contemplating multiple awards of contracts to perform financial and compliance audits, principally of government corporations. Each selected firm would receive an indefinite quantity contract for estimated direct labor hours of work and would be reimbursed at fixed hourly rates for the various personnel classifications called for in the RFP. Individual delivery orders for specific audit work would be competed among the holders of these indefinite quantity contracts.

Twenty-eight firms submitted timely proposals in response to the RFP. GAO determined that 12 proposals were within the competitive range. Written and oral discussions were then held with the competitive range offerors, and best and final offers were requested and evaluated. DH&S' technical score was the highest and its proposed cost was the third lowest, giving the firm the highest total combined score. Under the RFP's established evaluation scheme, it is undisputed that DH&S was eligible for award selection. However, awards were delayed until March 6, 1986, because of funding and other considerations, and, in the interim, GAO determined that an award to DH&S would be improper for reasons of conflict of interest because of GAO's on-going investigation of DH&S activities at another federal agency. GAO's rationale for this determination is as follows:

" . . . There is no question that this investigation creates a clear conflict of interest between DH&S and the GAO such as to preclude them from consideration for any financial audit of the GAO. This investigation also makes it improper . . . to contract with them for audit services for government corporations because of the potential for awarding those contracts to be interpreted as having a bearing on [GAO's] independence in conducting such investigation.

. . . [T]his position is clear in regard to [GAO's] independence standards . . . both regarding independence in fact as well as independence in appearance [T]herefore . . . it is totally inappropriate to consider them for an award under this RFP."

Accordingly, awards were then made to the offerors ranked second, third, and fourth as the result of the evaluation process. DH&S was notified of these awards, and a debriefing was held at the firm's request. DH&S was advised that it had not been selected for an award because, due to the existence of the on-going investigation, it could not function with the degree of independence required in an auditor acting on GAO's behalf. GAO stated to the firm that this inability to maintain audit independence affected not only any potential audits of the agency at issue in the investigation but also audits of other agencies and GAO itself. GAO further advised DH&S that it was necessary to maintain a close working relationship with any firm selected to perform audit

services under the RFP, and that such a relationship with DH&S would be inconsistent with GAO's need to distance itself from the firm so as to maintain strict impartiality in conducting the investigation.

Protest Position

DH&S argues that no conflict of interest exists, or could conceivably exist, because of GAO's investigation of the firm's activities at another agency. DH&S notes that it is a very large auditing organization and that the investigation in question reaches only a few individuals in a non-audit function specifically relating to that one agency. Since the RFP does not contemplate the performance of any audit at that agency, and no individual delivery order for audit services at GAO itself need be issued to DH&S if it were to be awarded a contract, the firm fails to see how its independence will be impaired by the on-going investigation. DH&S contends that the procurement regulations governing the disqualification of offerors from eligibility for an award on the ground of conflict of interest are inapplicable in this particular situation.

In essence, DH&S asserts that GAO's action constituted an improper de facto debarment without regard for the due process rights that should have been afforded the firm. DH&S urges that settled case law holds that a potential government contractor has a constitutionally protectable interest in its eligibility to receive contracts, and, therefore, that its disqualification for reasons related to its perceived lack of integrity properly cannot be effected unless the government provides for the exercise of the firm's fundamental rights to notice of the charges against it and an opportunity to be heard in the matter.

Analysis

We recognize that an offeror can only be debarred or suspended from competing for government contracts for just cause through the specific procedures set forth in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.406, et seq. (1984), providing for procedural due process. Thus, it is improper for a contracting agency to subject a firm to a de facto debarment that avoids those procedures by repeated determinations of nonresponsibility, or even a single negative determination if it is part of a long-term disqualification attempt. Howard Electric Co., 58 Comp. Gen. 303 (1979), 79-1 CPD ¶ 137.

GAO has made no determination that DH&S is nonresponsible to perform any contract under the RFP for reasons of a perceived lack of integrity. Consequently, the situation is not one involving the firm's constitutional interest to be free from governmental defamation so as to trigger its rights to notice and an opportunity to be heard. See United Aircraft and Turbine Corp., B-210710, Aug. 29, 1983, 83-2 CPD ¶ 267; cf. Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F. 2d 953 (D.C. Cir. 1980) (nonresponsibility determination on the ground of

bidder's perceived lack of integrity requires notice to the firm of the charges against its integrity before it may be denied contracts on that basis).

Moreover, a case of de facto debarment does not arise here because GAO has not generally excluded DH&S from contracting with it or any other federal agency. United Aircraft and Turbine Corp., supra. In this regard, GAO notes that it has obtained consulting and training services from DH&S in the past and states that it would award contracts for services of that nature to DH&S in the future. The only thing DH&S has been denied in this case is a one-time opportunity to perform a particular contract for audit work. See Howard Electric Co., supra.

Accordingly, we believe the issue is whether it was reasonable for GAO to disqualify the firm from an award under the RFP for reasons of conflict of interest. This Office has consistently held that the responsibility for determining whether a conflict of interest will exist if a firm is awarded a particular contract and to what extent a firm should be excluded from the competition rests with the contracting agency. We will not overturn such a determination except where it is shown to be unreasonable. Systemetrics, Inc., B-220444, Feb. 14, 1986, 86-1 CPD ¶ 163. This rule is equally applicable where, as here, the agency has a proper basis to exclude a firm for conflict of interest reasons even though the solicitation itself did not expressly provide that the firm would be ineligible to receive the award. Id.

With respect to business practices and personal conflicts of interest involving government employees, the procurement regulations state that the general rule is "to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." (Emphasis supplied.) FAR, § 3.101-1 (FAC 84-5, Apr. 1, 1985). With respect to organizational conflicts of interest, the FAR recognizes that the nature of the work to be performed under a proposed government contract may give rise to such a conflict when the contractor's objectivity in performing the work is likely to be impaired. FAR, § 9.501(b). Accordingly, it is the contracting officer's responsibility to take appropriate measures to avoid, neutralize, or mitigate organizational conflicts of interest in light of the underlying principle of preventing the existence of conflicting roles that might bias a contractor's judgment. FAR, § 9.505(a).

We believe the above provisions of the FAR are relevant to this matter by indicating a general policy regarding the avoidance of conflicts of interest. In any event, a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable law or regulations, when the needs of the agency or the nature of the procurement dictates the use of such restrictions, even where the restrictions have the effect of disqualifying particular firms from receiving an award because of a conflict of interest. Defense Forecasts, Inc., B-219666, Dec. 5, 1985, 65 Comp. Gen. _____, 85-2 CPD ¶ 629.

GAO's exclusion of DH&S from an award under this RFP is based on its conclusion that such an award would compromise GAO's on-going investigation of that firm's conduct in connection with another federal contract involving SSA. Obviously, GAO must maintain a posture of strict impartiality while reviewing DH&S' activities at SSA. We do not see how GAO can choose DH&S as its agent to conduct financial and compliance audits without compromising GAO's appearance of impartiality in conducting its on-going investigation of DH&S. We think that an award to DH&S under this RFP clearly would create a conflict of interest between the parties because of this investigation.

In summary, we believe that GAO's action in disqualifying DH&S from this particular contract for conflict of interest reasons was proper. We have upheld an agency's rejection of a proposal because strict policy required the agency to avoid even the appearance of a conflict. See Defense Forecasts, Inc., supra. Thus, it is the conflicting roles in which each party would find itself, and not anything learned during the course of the investigation per se, that has caused DH&S' disqualification. Accordingly, we find no legal error in denying DH&S an award under this RFP in the circumstances.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel